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No. 80-269

IN THE

Supreme Court of the United States

October Term, 1980

THE STATE OF CONNECTICUT,

Petitioner,

v.

MURRAY GOLD,

Respondent.

On Writ of Certiorari to The Supreme Court of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the petition for certiorari should be denied because the holding of the Connecticut Supreme Court that it was reversible error for the trial court to exclude third-party declarations against penal interest is premised on an independent and adequate state ground?

2. Whether the petition for certiorari should be denied because the decision of the Connecticut Supreme Court is consistent with state law precedent and federal law and therefore does not present a substantial federal question warranting review?

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This brief is submitted in opposition to a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Connecticut reversing respondent's conviction on two counts of murder and remanding the case for a new trial.

Constitutional and Statutory Grounds

The decision of the Supreme Court of Connecticut did not rest on any federal constitutional or statutory ground. Connecticut rendered its decision solely on the basis of

Connecticut case law holding that trustworthy third-party statements against penal interest are an exception to the hearsay rule and therefore admissible.

Statement of the Case

The Proceedings Below

On October 15, 1974, respondent was indicted in New Haven County, Connecticut for the murders of his former in-laws, Rhoda and Irving Pasternak. On March 31, 1976, the trial ended in a mistrial when the jury was unable to reach a verdict.

After a second trial and three days of deliberation, the jury convicted respondent of two counts of murder. On January 26, 1977, he was sentenced on each count to a twenty-five-year to life term of imprisonment, the sentences to be served concurrently. The respondent, who has asserted his innocence throughout, has nonetheless served more than five years of this sentence.

On appeal the Supreme Court of Connecticut held that the trial court had committed reversible error in excluding significant exculpatory evidence that was admissible, under prior Connecticut case law, as a third-party declaration against penal interest exception to the hearsay rule. The exculpatory evidence which the jury never heard was that one Bruce Sanford had confessed to the crimes and then committed suicide. Also excluded was nonhearsay evidence confirming the confession.

Statement of the Facts

The Prosecution's Case

The charges against respondent arose out of the violent deaths of Irving and Rhoda Pasternak who died as a result of more than sixty knife thrusts with a Buck hunting knife on the evening of September 26, 1974 in Waterbury, Connecticut. Respondent, a New York City stockbroker with an unblemished prior record, had been divorced upon amicable settlement terms from the Pasternaks' daughter ten years before the crime (T. 1978).*

The prosecution conceded that it had no direct evidence of guilt and that its case was based exclusively on circumstantial evidence (T. 3981). Thus, no eye-witness testimony placed respondent at the scene on the night of the crime; and no fingerprints, of the more than thirty prints found in the murder home, were those of respondent (T. 1802). Moreover, the prosecution announced to the jury that it knew of no motive for Respondent Gold to have committed the crime (T. 4002).

Instead, the prosecution's case consisted of testimony that respondent had visited his former sister-in-law ten days before the murder and asked about the Pasternaks, that he had been seen by a neighbor outside the Pasternak home early one morning two days before the crime, that respondent wore shoes with "cats paw" heels "similar" to

* Numerals in parentheses preceded by the letter "T" are references to the transcript of the second trial lodged by petitioner with the clerk of the Court.

the footprints found at the murder scene* and that a button and plastic loops allegedly found in the murder bedroom matched buttons and plastic fasteners found in a Buttoneer Kit (a button fastening kit) allegedly seized from respondent's apartment** (T. 1977, 2241-53, 2985-90, 3042-44).

The Defense Case

The defense sought to establish that another person, one Bruce Sanford, a man with a criminal record,† and with the motive and opportunity to commit the crime, had in fact killed the Pasternaks. Outside the hearing of the jury the defense presented the following sworn testimony:

(1) Declarations against penal interest made by Bruce Sanford—a confession that he killed Rhoda Pasternak, an expression of regret for killing Rhoda, threats to Irving, a plea for help to get out of the state—all made to *four* of his friends, none of whom knew respondent;

(2) Testimony by eye witness Dorothy Crocco who identified a picture of Bruce Sanford as the man she saw run-

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* However, the evidence at trial also established that more than 10,000 such "cats paw" heels were sold in Connecticut in 1974 alone (T. 3414).

** The reliability of this button evidence was refuted by a defense expert (T. 3653) as well as by the Court below which detailed the inconsistent testimony surrounding the claimed discovery of the button in the bedroom where Rhoda Pasternak was killed (see Appendix to the Petition for Certiorari at 4A) as well as the prosecution's assertion that it had seized a particular Buttoneer Kit from respondent's home (Appendix at 5A).

† At the first trial it was established that Sanford had been convicted of possession of a dangerous weapon. (Transcript of first trial at 21). The defense also offered proof that Sanford was an admirer of Charles Manson, a fancier of knives and a member of a motorcycle gang, who carried a knife in the top of his boots and wore a bicycle chain as a belt (T. 3515, and the transcript of the first trial at 4-5).

ning from the direction of the Pasternak home shortly after the murders (T. 3563);

(3) Testimony as to Sanford's unexplained absence from his home on the night of the crime* and his precipitous flight to Florida on the day after the murders (T. 3506, 3447); and

(4) Physical evidence of Sanford's bloody shirt seen by witnesses on the night of the crime (T. 3509-10).

In particular, Sanford's declarations against penal interest included a confession of what he did, that he was sorry he had to kill Rhoda Pasternak and that he could not stand living. This statement was made to his friend, Robert Bourassa, and heard by his friend Craig Yashenko on December 10, 1974, less than three months after the murders and on the night Sanford committed suicide (T. 3511-13).

In addition, Patricia Morrison, Sanford's friend for 20 years, testified that two days prior to the murders Sanford had confided in her that he would "get" Pasternak. Specifically, Morrison testified that Sanford said of Pasternak, a lawyer, "[t]he bastard is representing my wife. He's telling her things and I think he's going to sell her out. . . ." Sanford further threatened that if his wife "didn't get what was coming to her from this hearing that he [Sanford] would get the no good Jew bastard one way or the other . . ." (T. 3455). Thereafter, just hours after the murders, San-

* At a bail reduction hearing, Waterbury Hospital's Dr. Spicuzza testified that on the night of the crime he treated Sanford for a superficial cut on his neck. At that time Spicuzza noted that the blood covering Sanford's clothing far exceeded the blood which could have emanated from his own injury (Transcript of the Bail Reduction hearing at 20-36).

ford telephoned Morrison to report that he had just done "something terrible that I'm never gonna be able to get out of. . . . I'm in a phone booth and I'm covered with blood and I have to get away right away. . . . Are you going to help me get out of the state?" (T. 3457).

Finally, on the day after the murders, and just prior to his precipitous departure for Florida—where he remained until after respondent's indictment—Sanford told Anthony Borelli, a member of his motorcycle club, that he had been taking care of people who had taken advantage of his wife (T. 3480, 3488-9).

The Trial Judge's Decision

The trial judge held that the admissions by Sanford and all of the surrounding circumstances were inadmissible. The Court found, relying on *State* v. *Stallings*, 154 Conn. 272, 224 A.2d 718 (1966) and *State* v. *Marshall*, 166 Conn. 593, 353 A.2d 756 (1974), that the declarations against penal interest were not a recognized exception to the hearsay rule in Connecticut and therefore were excludable (T. 3555). Moreover, the judge opined that even were he to apply the Federal Rules of Evidence, the statements were inadmissible as they did not pass the threshold test of trustworthiness (T. 3857).*

As to the nonhearsay Sanford evidence—the eye-witness testimony that Sanford had been seen running from the Pasternak home, his unexplained absence from home at the time of the crime, his bloody shirt, and his flight to Florida the day after the murders—the Court held that it was all irrelevant (T. 3868).

* This despite the fact that neither the declarant nor the witnesses had motive to assist respondent as none of them knew him.

The Connecticut Supreme Court's Decision*

On appeal the Connecticut Supreme Court reversed respondent's conviction on the ground that the trial court had committed substantial evidentiary error in excluding the Sanford declarations against penal interest.** Relying on *State* v. *DeFreitas,* ——— Conn. ——— (41 Conn. L.J., No. 28, p. 1) (1980) which had four months earlier overruled *State* v. *Stallings, supra,* the court held that exclusion of the confession to Bourassa violated Connecticut's declaration against penal interest exception to the hearsay rule:

> In conclusion, we hold that the exclusion of the Bourassa testimony regarding Sanford's confession was in violation of our statement against penal interest exception to the hearsay rule because the corroborating circumstances clearly indicate that the confession was trustworthy. (Appendix at 19A)

In light of the reversal on state law grounds, the court eschewed consideration of the due process claim that had been raised by respondent:

> In view of this holding we need not consider whether the exclusion of this evidence deprived the defendant of his constitutional right to due process of law. "We thus follow the recognized policy of self-restraint and the basic judicial duty to eschew unnecessary determinations of constitutional questions. *Pepin* v. *Danbury,* 171 Conn. 74, 88, 368 A.2d 88 [1976]. See also *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568-73, 67 S.Ct. 1409, 91 L.Ed. 1666 [1947]; *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288,

* The opinion of the court below is set forth in the appendix to the petition at 1A-40A.

** The Connecticut Supreme Court also found that the trial court had abused its discretion in excluding the nonhearsay Sanford related evidence (Appendix at 25A-27A).

346-47, 56 S.Ct. 466, 80 L.Ed. 688 [1936] (Brandeis, J., concurring). See generally A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962)." *Negron* v. *Warden,* —— Conn. —— (41 Conn. L.J., No. 39, pp. 1, 5-6) (1980). Where an evidentiary error not of constitutional dimension is found, the defendant must show that the error was harmful. See *State* v. *Sorbo,* 174 Conn. 253, 257, 386 A.2d 221 (1978); *Aillon* v. *State,* 168 Conn. 541, 547-48, 363 A.2d 49 (1975); *State* v. *L'Heureux,* 166 Conn. 312, 323-24, 348 A.2d 578 (1974). We conclude that the defendant has met that burden here. (footnote omitted) (Appendix at 19A-20A)

As to the other Sanford statements, the court below held that they were all trustworthy declarations against penal interest and therefore, improperly excluded.

> This court now rules that a statement against penal interest is one which at the time it is made so far tends to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true.
>
> * * *
>
> We find that the Sanford statements to Morrison and Borelli fall squarely within the definition of statement against penal interest that we have now adopted. . . .
>
> * * *
>
> We find that these statements meet the threshold level of trustworthiness required of statements against penal interest. (Appendix at 23A-24A)

Addressing the trial court's finding that the statements were not sufficiently trustworthy, the Connecticut Supreme Court held ". . . we disagree and conclude that the trial court abused its discretion." (Appendix at 25A)

Summary of Argument

1. This Court should decline jurisdiction because the decision of the Connecticut Supreme Court rests on an independent and adequate state ground. Connecticut expressly decided this case on the ground that the trial court had erroneously excluded certain evidence admissible under Connecticut law. Connecticut did not decide any federal question and did not evade any federal right. Accordingly, Connecticut's decision is not reviewable by this Court.

2. The exercise of certiorari jurisdiction is not warranted because the decision of the Connecticut Supreme Court applying Connecticut law is in accordance with federal statutory and case law and state court precedent. *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); F.R. Evid. 804(b)(3); *State* v. *DeFreitas*, —— Conn. ——; —— A.2d —— (1980).

Reasons for Denial of the Petition

I.

The holding of the Connecticut Supreme Court that it was reversible error for the trial court to exclude trustworthy third-party declarations against penal interest is premised on an independent and adequate state ground; therefore, the Court should decline to exercise its certiorari jurisdiction.

This Court has repeatedly declined to review state court decisions which rest on independent and adequate state grounds. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956); *Herb* v.

Pitcairn, 324 U.S. 117 (1945); *Fox Film Corporation* v. *A.B. Muller,* 296 U.S. 207 (1935); *Murdock* v. *City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875). In its landmark decision in *Herb* v. *Pitcairn, supra,* at 125-6 the Court explained its rationale:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock* v. *Memphis,* 20 Wall. (US) 590, 636; *Berea College* v. *Kentucky,* 211 U.S. 45, 53; *Enterprise Irrig. Dist.* v. *Farmers Mutual Canal Co.,* 253 U.S. 157, 164; *Fox Film Corp.* v. *Muller,* 296 U.S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

The decision of the Connecticut Supreme Court in the instant case was clearly based on a nonfederal ground. The court below expressly premised its holding on the Connecticut rule established in *State* v. *DeFreitas,* —— Conn. ——, Vol. XLI, No. 28 Conn. Law Journal, p. 1, that trustworthy third-party statements against penal interest are admissible if the declarant is unavailable:

> In conclusion we hold that the exclusion of the Bourassa testimony regarding Sanford's confession

> was in violation of our statement against penal interest exception to the hearsay rule because the corroborating circumstances clearly indicate that the confession was trustworthy. (Appendix at 19A)

The court below also noted that it was not deciding the federal question raised by respondent—a claim that the exclusion of the evidence violated his due process rights—because it regarded the nonfederal ground as dispositive of this case:

> In view of this holding we need not consider whether the exclusion of this evidence deprived the defendant of his constitutional right to due process of law. "We thus follow the recognized policy of self-restraint and the basic judicial duty to eschew unnecessary determinations of constitutional questions." (citations and footnote omitted) (Appendix at 19A-20A)

Despite this explicit holding petitioner argues to the Court that reliance below on *State* v. *DeFreitas, supra,* which in turn relied on *Chambers* v. *Mississippi,* 410 U.S. 284 (1973), transforms a state law evidentiary issue into a federal issue worthy of review (Petition at 18-19). This argument is without merit.

While the Court's jurisdiction is determined by 28 U.S.C. §1257(3) and the decisions of the Court, rather than state court pronouncements that constitutional issues are not involved, the Court will decline jurisdiction to review state court holdings where independent and adequate state grounds appear in the record. *Fox Film Corporation* v. *A.B. Muller, supra; Enterprise Irrigation District* v. *Farmers Mutual Canal Company,* 243 U.S. 157 (1917). In

the instant case, not only does the record present an adequate state law ground, but also it is devoid of the requisite federal constitutional issue.

The opinion below is premised on the finding that the third party declarations at issue were sufficiently trustworthy to qualify as an exception to the hearsay rule. The court concluded that in light of the critical nature of the declarations, the trial judge's exclusion of the evidence was reversible error.

Without doubt it is within Connecticut's power to regulate the procedures by which its criminal laws are implemented including the admissibility of evidence. *Irvine* v. *California,* 347 U.S. 128 (1954) (plurality opinion). Its decision in this regard is not subject to review unless it offends minimum constitutional standards. *Patterson* v. *New York,* 432 U.S. 197 (1977). Clearly, the petitioner cannot claim the result below offends due process as the Fifth and Fourteenth Amendments do not protect the prosecution from the admission of evidence exculpatory to the defendant.

Similarly, the petitioner cannot fairly argue from this record that the decision of the court below is an attempt to evade federal constitutional law. The application of the Connecticut rule below was not arbitrary. Rather it was mandated by Connecticut's earlier decision in *State* v. *DeFreitas, supra.* An examination of *DeFreitas* discloses no inconsistency of judicial opinion between *DeFreitas* and the instant case so as to even suggest that the court invoked the Connecticut rule in order to evade a federal constitutional issue.

Finally, petitioner's citation of federal law as persuasive authority does not impair the adequacy of the Connecticut rule as an independent ground of decision. See, *e.g., Fox Film Corporation* v. *A.B. Muller, supra,* and *infra* at 13-16.

Therefore, were the Court to grant the petition, review would result in just the type of advisory opinion the Court has traditionally refused to render. Assuming arguendo that the federal constitutional issue were decided by the Court in the prosecution's favor, the decision would not be controlling and the result below would remain unaffected. This fact crucially distinguishes this case from *Chambers* v. *Mississippi, supra,* relied upon by the prosecution, where the decision of the due process question presented by the petitioner defendant was dispositive and changed the outcome of the case.

Jurisdiction to review should be denied here because the decision below is grounded solely on an application of state law which is supported by state precedent and in no way evades a federal constitutional right.

II.

The decision below does not present a substantial federal question because the Connecticut rule is in conformity with well-settled federal law.

The "Connecticut rule" set forth in *DeFreitas* by the court below and applied in the instant case is consistent with well-established federal statutory and case law as well as the law of many states. *Chambers* v. *Mississippi,* 410 U.S. 284 (1973); Fed. R. Evid. 804(b)(3); Note, *Declara-*

tions against Penal Interest: Standards of Admissibility under an Emerging Majority Rule, 56 B.U.L. Rev. 148 (1976). Therefore, the decision of the Connecticut Supreme Court applying Connecticut law presents no conflict with the law of the federal courts which would require resolution by the Court.

Contrary to petitioner's assertion, the Connecticut rule is an explicit adoption by Connecticut of the language of Rule 804(b)(3) of the Federal Rules of Evidence. Indeed, the Connecticut Supreme Court states below:

> We are persuaded of the logic and soundness of the federal rule and the trend to reject a narrow and inflexible definition of a statement against penal interest in favor of a definition which includes not only confessions but other remarks which would tend to incriminate the declarant were he or she the individual charged with the crime. . . . Here, we . . . adopt the definition of statement against penal interest contained in the Federal Rules of Evidence. (Appendix at 23A.)

The Connecticut rule, like Federal Rules of Evidence 804(b)(3), and this Court's decision in *Chambers* v. *Mississippi, supra,* provides that only trustworthy declarations against penal interest are admissible and the court below carefully set forth the substantial reasons supporting the reliability of the excluded Sanford testimony. Specifically, the Court noted that Sanford had confessed spontaneously to a friend within three months of the murders, that confession was heard by another of his friends, that Sanford's confession was clearly against interest and there is no evidence that he had any ulterior motive to make the statement.

Additionally, the Court noted that Sanford had made corroborating statements to two other friends. Before the crime he had threatened Irving Pasternak; after the crime he admitted he had "done something terrible," that he was covered with blood, that he needed to get out of town, and that there were people who needed more stitches than he did.

Finally, the Court below cited to the substantial non-hearsay evidence which confirmed the reliability of the declarations; to wit: Sanford was identified as the man seen running from the direction of the Pasternak home on the night of the murders, Sanford was not at his own home on that night, he was covered with blood from head to foot on the night of the murders, and he fled to Florida the day after the murders, returning only after respondent was indicted.

But even if Connecticut had chosen to adopt a hearsay exception for declarations against penal interest requiring a lesser showing of trustworthiness than was present in *Chambers* v. *Mississippi, supra,* such rule would not present a substantial federal question. It is the essence of federalism that Connecticut is free to develop its own common law and its procedures may vary from that of other states and the federal courts so long as those procedures satisfy constitutional minimums. *Addington* v. *Texas,* 441 U.S. 418, 431 (1979). The Constitution in no way restricts the states from expanding federally recognized rights. In this regard, Michigan, New York and California have adopted a rule admitting declarations against interest without a threshold showing of trustworthiness. *People* v.

Edwards, 396 Mich. 551, 566, 242 N.W.2d 739 (1976); *People* v. *Brown,* 26 N.Y.2d 88, 257 N.E.2d 16 (1970); *People* v. *Spriggs,* 60 Cal. 2d 868, 389 P.2d 377 (1964) *(en banc).*

Indeed, Mr. Justice Brennan has recently noted that state courts presented with both federal and state constitutional questions can and have broadened individual rights by deciding the issue solely on state law grounds:

> Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism. Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 495 (1977).

The federal cases cited by petitioner do not aid its argument that the decision of the court below is inconsistent with federal law. The standard applied in each of the cases cited was applied by the Connecticut Supreme Court. That the result in those cases differed from the result below is simply beside the point. *Burks* v. *Lasker,* 441 U.S. 471, 479 (1979); *Robertson* v. *Wegmann,* 436 U.S. 584, 593 (1978). The Court has not chosen to act as a further court of appeals available to all petitioners dissatisfied with the application of law to facts by the highest state court. To warrant certiorari review by the Court, the factors of decision applied below must be in conflict with federal law or a federal right. Since the Connecticut rule is consistent with and not contrary to federal law, there is no federal interest which supports the grant of this petition.

Conclusion

This petition should be denied.

Respectfully submitted,

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